

MAINE STATE HARNESS RACING COMMISSION  
MINUTES OF MEETING  
OCTOBER 13, 2017

Gambling Control Board Conference Room  
Department of Public Safety  
45 Commerce Drive, Augusta, Maine

Commission Members Present: William Varney, Chair, Gary Reed, and Michael Graham

Commission Members Absent: Alexander Willette and William McFarland

Staff Members Present: Ron Guay, AAG, Henry Jennings, Carol Gauthier, Miles Greenleaf, and Mari Wells Eager

**1. Call the Meeting to Order and Introductions:** William Varney, Chair

**2. Review and Approval of Minutes**

Commissioner Reed made a motion to approve the minutes of September 22, 2017 as submitted. Commissioner Graham seconded. Vote 3-0.

**Review and Approval of Decision and Orders**

AAG, Guay stated that he does have a decision and order prepared for Mr. Case that was not circulated and it reflects an analysis of the case. He would prefer not to circulate the decision until such a time that the Commission decides whether or not they are going to reopen the case. Commissioner Varney stated that was ok.

**3. Adjudicatory Hearings:**

**a. Reopening of the Allie Hiscock Complaints 2017 MSHRC 9, 14, and 15.** Mr. Hiscock had three complaints heard in front of the Commission on September 22, 2017. The Executive Director and the Hearing Officer are jointly requesting reopening of the penalty phase of the hearing based on information that was not disclosed at the hearing and based on consideration of other recent penalties levied by the Commission. Allie Hiscock was not present. AAG, Guay stated that he did not write a decision and order on this. He stated that Mr. Jennings will give the reasons. Mr. Hiscock questioned what had happened. Since the state and Mr. Hiscock wanted to bring the case back to you, AAG, Guay stated that he would do it. He asked Mr. Jennings if Mr. Hiscock has elected to not come here today. Mr. Jennings stated yes. Mr. Jennings asked AAG, Guay if they need to vote to reopen the hearing. AAG, Guay asked the Commissioners if they object to reopening the case. The Commissioners stated no. Mr. Jennings stated that after their last meeting, he took a look at all of the decisions that they made relative to the prohibited substances. He stated that Mr. Hiscock has terminal cancer and is broke. Commissioner Graham stated that personally he doesn't think terminal cancer has nothing to do with it. He sympathizes and knows Mr. Hiscock fairly well. One of the things that bothered him with Mr. Hiscock is if the test had been continually coming down but then they went up it was very obvious that he gave another injection. Mr. Hiscock was also told by the state vet to not put the horse in. AAG, Guay stated that there was a question asked if there could be a modification in the penalty. The answer is yes. You have done that. It doesn't mean you should. It is within your power to do it. Commissioner Varney made a motion to delay the suspension of the horse until

January 1, 2018 and set up a payment plan for the return of purse and the fine, but rescinded if he comes back with a positive. Commissioner Graham seconded. Vote 3-0.

- b. **Further Discussion about the Walter Case, Jr. License Denial Hearing.** A hearing was held on September 22, 2017 relative to the Department's preliminary denial of Mr. Case's license. The Commission Chair has requested that there be further discussion about the license denial hearing. AAG, Guay stated that subsequent to the last hearing regarding Mr. Case a member of the public filed a complaint with the Attorney General's office regarding his conduct during the proceedings in his role as a hearing officer. The Commissioner's should be aware of that. Theatrically, it could impair him. He stated there was a procedure flaw that occurred at the last hearing. Commissioner Varney stated that Commissioner Graham should not have recused himself. He thinks the hearing should be reopened and discussed and have Commissioner Graham participate in the discussion. Commissioner Graham asked if they reopen the hearing, can he use exhibit 5. AAG, Guay stated that if they do reopen, it is still a matter of objections. He asked the Commissioners, the department, and Attorney Fisher if they object to having him continue as hearing officer. There was no objection. The parties had no objection to reopen the hearing. Commissioner Graham made a motion to reopen the hearing in the matter of Mr. Case. Commissioner Varney seconded. Vote 2-1. Commissioner Reed opposed. The Commissioners left the room at this time. AAG, Guay asked the parties what they wanted to do. Ms. Wells stated that she did not object to exhibit 5 to be entered. Attorney Fisher stated that he is going to withdraw an objection to exhibit 5 so that all the Commissioners have equal information and he also brought exhibit 6 which had been redacted. Attorney Fisher discussed the exhibit with his client and Mr. Case was ok with allowing them to consider exhibit 6. AAG, Guay marked the exhibit as joint 1. The Commissioners returned at this point. AAG, Guay stated that to the extent that this would fall under the reopening rule he would ask the parties to formally waive the 10-day notice. Ms. Wells and Attorney Fisher both stated that they would waive the notice. AAG, Guay stated that the parties jointly moved for admission of exhibit 5. He also stated that the parties have agreed for the admission of joint exhibit 1 which is the Pennsylvania Order that has been redacted. The Commissioners read the exhibits. AAG, Guay stated that you've got to look at the preliminary denial and the notice of hearing and the question is whether or not section 283 prohibits Mr. Case from having a license in the State of Maine. That is pretty much a legal analysis. What you need to decide is whether the Pennsylvania Decision prevents him from being licensed in Maine. AAG, Guay stated that he heard Commissioner Varney during deliberations say that because of Chapter 17, section 8 which reads "any person whose character and general fitness are such that continued participation in harness racing by that person is inconsistent with the public interest and the best interests of racing generally, shall be suspended for a period not to exceed one year." Commissioner Varney raised that issue. Under your rules, if someone is found unfit to participate in harness racing the period of time that they are prohibited from participating in harness racing is one year. When you are deliberating, look at joint exhibit 1 and take note on page 11 the basis for the denial is language that parallels Chapter 17, Section 8. AAG, Guay stated to the Commissioners that they do need to have a discussion as to that legal issue that was raised. The court is going to look at how do you interpret that section 283. Do you give weight to a decision from another state if it's inconsistent with what is available in Maine? The second thing you need to look at is on page 10. Do you give weight to a decision from another jurisdiction if that decision would not be one that would occur in Maine? In this case, it would be procedurally. In the state of Maine, a license is a property right it is not a privilege. The state has to prove that it has the basis to remove that property right. That is a fundamental difference between Pennsylvania and Maine. Pennsylvania is not a property right. It did not have to prove that it had a basis to deny Mr. Case a license. There was a different set of laws

and burdens. Attorney Fisher stated that he would be happy to answer any questions from the Commission. Ms. Wells stated that the Statute says shall refuse. The legislature could have put other contingencies in the Statute. Attorney Fisher stated that he would like to bring up 279-A, Title 8, Chapter 11. It makes it very clear that this Commission makes the rules. It reads, "The Commission may issue conditional licenses to owner, trainers, drivers, grooms and all other persons participating in harness racing, including pari-mutuel employees and race officials if one or more criteria are not met as contained in the commission rules." Section 21, Chapter 17 says, "all penalties imposed by any Racing Commission in any racing jurisdiction shall be recognized and enforced by this Commission unless application is made for a hearing before this Commission wherein the applicant must show cause as to why such penalty should not be enforced." Attorney Fisher stated that he thinks good cause has been shown. He passed out Title 5, Part 14, Section 5301, 5302, and 5303. The Legislature here in Maine has made it very clear that refusing to issue a license, or suspending a license or denying a license of someone because of a criminal conviction is allowed in some circumstances, but it is absolutely not even to be considered if it is over 3 years after the release of the applicant. Mr. Case has been out of prison since 2008. Pennsylvania law and Maine law don't agree. AAG, Guay asked Ms. Wells for her argument. Attorney Fisher objected before she started. AAG, Guay stated that there will be a running objection. Ms. Wells stated that in regards to the Pennsylvania Order it is not the job of the Commission to determine if the Pennsylvania did its job in Pennsylvania. The fact is that his license is currently refused in Pennsylvania through October 2018. If you look at joint exhibit 6, unlike what Attorney Fisher said they did not refuse his license because of his criminal conviction they did it because of his misrepresentation to the Commission. They talked about his character it was not based on his criminal conviction. AAG, Guay closed the hearing for deliberations. Commissioner Varney asked if they have to go by another states rule. Why would we allow Pennsylvania to tell us that we can't license him? He has firm belief that they do not have to adhere to their rulings if it isn't consistent with the laws that we have in Maine. Pennsylvania says that Mr. Case can't reapply for 5 years apparently, it's been 10 years and the most we can suspend someone is a year before they can reapply. He doesn't think that's right, he doesn't think that's fair, he doesn't think that's just, and he thinks the Commission has the power to deny that and over look that. Commissioner Graham stated that he has taken into consideration that they have to enforce the penalties of another judication unless they apply here for a hearing. Pennsylvania took his license in 6/25/2004 for the reason of what he was sent to prison for. They said he could reapply in February 2012. They denied it. They say in their own rules that it was nothing that he did racing that would keep him out; then they go on to say that the "applicant has made good progress in his rehabilitation since his release from incarceration. However, in the opinion of this Commission, Applicant's "experience, character and general fitness" is not consistent with the best interests of the public, or with racing." He has a problem with that when he's been out for 9 years. Mr. Case should be getting a probationary license here in Maine. Commissioner Reed stated that reading a document that is heavily redacted as that is like reading a book with every page turned out, it's not very productive. As to the argument whether or not we are bound by other jurisdictions, Title 8, Section 283 was not written by any other jurisdiction is was written by the Maine Legislature, and it is clear and unequivocal in its language. It doesn't say to us if you feel like it you can deny a license but you don't have; it says you shall. He puts his faith in 283's language. If we start down the road of interpreting a rule the way we think it ought to be written as opposed the way it is written, we are heading down a dangerous road. Our credibility and integrity will be irrepealably damaged. AAG, Guay asked the Commissioners when making a motion to make specific findings around whether or not the Pennsylvania Oder is enforceable in Maine. He stated

that he heard two commissioners say that they don't need to enforce Pennsylvania and one that is saying that we don't have the option to make that interpretation. Commissioner Graham made a motion to grant Mr. Case a provisional license for one year. His basis for that is that even though Mr. Case is denied in Pennsylvania, he believes Mr. Case has shown cause as to why his penalty shouldn't be enforced against him. Pennsylvania admits that Mr. Case hasn't done anything wrong since 2004. Commissioner Varney seconded the motion and concurred with the facts of Commissioner Graham. AAG, Guay asked what are the conditions on his license. Commissioner Graham stated that as long as he keeps his nose clean. AAG, Guay stated that minor violations like driving violations would not count. Vote 2-1. Commissioner Reed opposed.

Commissioner Varney asked AAG, Guay if the State could appeal this. AAG, Guay stated theoretically they could. This is a legal issue. Believe it or not, you interpret your law and it's possible the judge could see it differently.

- c. **RE: Jason Bertolini, Complaint Number 2017 MSHRC 26.** Mr. Bertolini is alleged to have violated MSHRC Rules Chapters 7 and 11. Mr. Bertolini is the trainer of record for the horse "Dragon King". A blood sample obtained from Dragon King following the Seventh Race at Topsham Fair on August 12, 2017 disclosed an elevated level of dexamethasone. Jason Bertolini was present and represented himself. AAG, Guay gave Mr. Bertolini his oath. He qualified the Commissioners. There were no objections up to this point by either party. Henry Jennings presented and moved for the admission of the following exhibits. Exhibit 1, Notice of Hearing; Exhibit 2, Owner/Driver/Trainer's License Application; Exhibit 3, Race Program; Exhibit 4, Notice of Positive Test; Exhibit 5, MSHRC Sample Tag; Exhibit 6, Sample Shipment Sheet; Exhibit 7, LGC Lab Certificate, and Exhibit 8, ARCI Guidelines. AAG, Guay admitted the exhibits without objection. He asked Mr. Bertolini if he admits to being the trainer of record of the horse "Dragon King" on August 12, 2017, and that the horse raced in the seventh race at Topsham Fair on August 12, 2017. Mr. Bertolini stated yes. AAG, Guay asked Mr. Bertolini if he admits that the horse "Dragon King" had an elevated level of dexamethasone in its system. Mr. Bertolini stated yes. Since Mr. Bertolini admitted to the substance being in the horse's system, they moved to the penalty phase. Mr. Jennings stated that the department wishes to continue with their policy to recommend a minimum penalty as prescribed in Chapter 17. If you look at dexamethasone, ARCI classify it as a Class 4 drug and penalty Class C. Then because it is not an NSAID, you have to look at the right-hand column as opposed to the left-hand column and the minimum penalty is a \$500 fine and return of the purse. Mr. Bertolini stated that he is aware of the return of purse but he thought the drug for a first offense was a warning. Mr. Jennings explained to Mr. Bertolini how you get to the recommended penalty. AAG, Guay closed the hearing for deliberations. Commissioner Graham made a motion to fine Mr. Bertolini a \$500 fine and the return of purse, and payment or arrangement of payment with the executive director within 30 days. Commissioner Reed seconded. Vote 3-0.

4. **Other business:**

None.

5. **Public Comment**

Diann Perkins stated that when she was on the Commission the violations and penalties started immediately. AAG, Guay stated that there are a number of things that used to occur. His office took a look at these things and harness racing has in their administrative procedures act there's certain due process steps. Harness racing has emergency powers. It's one of the few, but the theme

of that is sort of exigent threat. Exigent threat is there's a reason you've got to do something right off because it can't be solved later. Historically, the things that come here are violations that happened in the past. The reason why we do written decision and orders, is you have three or four or five decision makers and they may have had different ideas of why they voted the way they did. There are times when it didn't capture what they were supposed to do. His office gives this advice to all their clients. If there is more than one decision maker, you reduce the decision to writing and they vote on it; and say yes that is what they meant.

Ms. Perkins stated that the 3-Year-Old Sire Stakes finals will be held at Scarborough Downs on October 14, 2017.

**6. Schedule of Future Meetings:**

November 8 and 9, 2017

December 14, 2017

January 19, 2018

**10. Adjourn**

10:57 a.m.